Supreme Court of the United States

OCTOBER TERM—1942

No. 61

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,
Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916, et al.,
Respondents.

REPLY BRIEF OF PETITIONER, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE.

H. C. McCOLLOM,
Attorney for Petitioner,
IRVING TRUST COMPANY,
As Trustee under
Debtor's Refunding Mortgage.

ORRIN G. JUDD,
Of Counsel.

Dated: Octc ɔer 10, 1942.

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REPLY BRIEF OF PETITIONER, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE

This brief is confined, as in the case of our main brief, to the question of relative priority of lien, as between Debtor's Refunding Mortgage and its First Mortgage.

Since the three principal lien questions are separate and distinct in nature, we deal with the arguments advanced by the respondents on each question in a separate Point.

The respondent, Institutional Bondholders Committee, says (Brief, p. 3) that the facts were not stated with sufficient fullness in our Main Brief, but that they are stated in the answering brief of the respondent, First Mortgage Trustees, "in most complete detail". It may be debatable whether our statement should have been longer or whether the statement by the First Mortgage Trustees is unnecessarily long. However, the important consideration is that the facts are singularly free from dispute although, of course, we disagree with various conclusions of fact drawn by the respondents.

I

Rolling stock acquired under conditional sale or equipment trust agreement is "free from the lien" of the First Mortgage and subject to the prior lien of the Refunding Mortgage.

(Answering Points I and II of the brief of the Institutional Bondholders Committee, and Points I and II of the brief of the First Mortgage Trustees.)

The respondents do not dispute that in order to bring any of the after-acquired property which is in question under the lien of the First Mortgage they must meet the test laid down in the decisions cited in our main brief (pp. 20-21) to the effect that after-acquired property clauses are to be strictly construed, and that the terms employed must "imperatively demand" the construction contended for by those asserting the lien. The respondents have fallen far short of meeting such test. In the case of the equipment purchased under conditional sale or equipment trust agreements (which equipment herein and in our main brief is sometimes termed "equipment-trust rolling stock"), the

language of the First Mortgage clearly leads to the opposite of the conclusion from that which the respondents seek.

The "exception clause" makes equipment-trust rolling stock "free from the lien" of the First Mortgage.

The clause which in our main brief is termed the "equipment trust clause", but in the brief of the First Mortgage Trustees and in the present brief is termed the "exception clause", reads as follows[1]:

> "* * * the Company may, *unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same*,[2] purchase and acquire equipment, *free from the lien* hereof, by *lease, conditional sale agreement or* under any form of *equipment trust*, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

The respondents state, in effect, that the words "free from the lien hereof" do not mean what they plainly say. The Institutional Bondholders Committee argues (Brief, p. 16) that the foregoing clause was not intended to create an exception "to *any* coverage by the First Mortgage" but "only to the *first lien character* of that First Mortgage coverage". The First Mortgage Trustees argue (Brief, p. 16) that the purpose was "not to free the Debtor's equity from the lien of the First Mortgage but merely to enable the Debtor to vest an *unencumbered security title* in the equipment lienor".

The respondents make many complicated arguments in their attempt to avoid the clear language of the "exception clause". While we are compelled to follow these arguments, to some extent, into their devious by-paths, we hope that

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[1]First Mortgage Trustee's brief, bottom of p. 114.

[2]Italics throughout the brief are supplied by counsel unless otherwise stated.

these arguments will not be permitted to obscure the real and very simple issue—which is whether the mortgage is to be read as it is written, or is to be read as rewritten by the respondents.

We have here a mortgage which in its earlier clauses contains language broad enough to cover the equipment in question; but such language is qualified by the final provision (the "exception clause") stating that unless First Mortgage cash or bonds have been used in the acquisition the Company may acquire equipment "free from the lien hereof" by conditional sale agreement or equipment trust.

In addition to the broad and plain words thus used, it is noteworthy that the respondents cite no decisions sustaining their position, while the position of the Refunding Mortgage Trustee is strongly sustained by the only two pertinent decisions which we have seen—i. e., the decision of Circuit Judge Sanborn in the first *Wabash Railroad Company* case (opinion printed in Record—R. 1721-34) and the decision of Judge Wilkerson in the *Chicago, Rock Island & Pacific Railway Company* case (printed as Appendix B to brief of respondents First Mortgage Trustees, pp. 116-144)—which decisions are referred to in our main brief (pp. 27-32).

The briefs of both respondents attempt to distinguish these decisions; but an examination of them will show that they are not distinguishable. We are unable to follow the respondents' argument[1] that those decisions are distinguishable because the provisions cutting down the broad coverage of the granting clauses in those cases were "free funds" clauses, whereas in the present case the cutting-down provision is termed an "exception clause". In the *Wabash* case, the language which it was assumed would place the equipment under the mortgage lien covered after-acquired property owned or used in connection with the mortgage lines of railroad (R. 1726); but nevertheless it

[1] Institutional Bondholders Committee brief, p. 8; First Mortgage Trustees' brief, p. 36.

was held that the clause which respondents term the "free funds" provision (and which, as in the present case, was the final clause) eliminated equipment not acquired by the use of the bonds issued under the Refunding Mortgage (R. 1728).

Similarly, in the *Chicago, Rock Island & Pacific* case, Judge Wilkerson said:[1]

> "Granting Clause Third, as noted above, conveys to the mortgage trustee all locomotives, cars and other rolling stock and equipment 'now held * * * or hereafter acquired * * *, and appertaining to or provided for use upon' said railway. On its face, this language, if not qualified by other language in the indenture, would seem to be broad enough to include additional rolling stock or equipment of the kind defined in the preceding paragraph. But, at the end of Granting Clause Fourth, a proviso will be noted that may materially qualify or circumscribe the broader language in Granting Clause Third."

It was then held that the proviso did cut down the broad language used in the prior clause and excluded the equipment claimed to be covered thereby.

The respondents endeavor to avoid the "exception clause" in the present case by arguing that the mortgage language must mean that the equipment in question is to be "free from the lien" of the mortgage, but also subject to the lien of the mortgage. It could not be both—unless, as was done in the case of the Refunding Mortgage, the equipment was first excluded from the lien, and then the equity in the equipment was placed back under the mortgage lien by the specific additional provision contained in the Refunding Mortgage (our Main Brief, p. 19).

The First Mortgage expressly purported to cover equitable as well as legal interests.[2] If it were not for the

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[1] See Appendix B to First Mortgage Trustees' brief, p. 125.

[2] See Appendix A to First Mortgage Trustees' brief, pp. 109, 110, 113.

"exception clause", the granting clauses of the First Mortgage would have covered the interest from time to time acquired by the Railroad Company in the equipment; but by the "exception clause" such equipment, as in the decisions just cited, was taken out from the lien unless acquired by the use of First Mortgage bonds or moneys. It cannot be asserted, even plausibly, that the equitable interest still remains under the lien.

The exclusion is perfectly clear; and the language used by Judge Sanborn in the *Wabash* case (R. 1724) is extremely pertinent:

> "* * * The natural, reasonable, more obvious meaning of a mortgage or contract should be preferred to a curious recondite signification discovered by ingenuity and study."

The Institutional Bondholders Committee asserts (Brief, p. 10) that it would be inequitable to enforce what we believe to be the plain language of the "exception clause". Such an argument has no force against the clear wording of the mortgage.

Moreover, if any inequity is involved it is on the part of the Institutional bondholders, who are trying to obtain property to which they made no contribution. It may also be noted that, so far from there having been any decrease in the amount of equipment subject to the First Mortgage, the mortgaged equipment has increased from 1,589 units, with a book value of $3,550,748, at the date of execution of the First Mortgage, to 7,032 units, with a book value (before depreciation) of $15,034,389 (First Mortgage Trustees' brief, p. 14)—not including the equipment-trust rolling stock here in dispute.

The only limitation upon the "exception clause" is the one limitation stated therein—that is, the case where First Mortgage Bonds or First Mortgage cash are uesd in the acquisition.

The First Mortgage Trustees attempt (Brief, pp. 21-25) to avoid the plain and compelling implications of the fact that four limitations are contained in the "free funds" clause and only one of the four limitations (that is, the case where First Mortgage bonds or cash are used) is contained in the "exception clause". They argue that the function of this limitation in the "exception clause" is different from the function of the identical limitation in the "free funds"; and therefore that the limitation contained in the "exception clause" should be disregarded in determining whether the equipment in question is excluded from the mortgage lien and that all four of the limitations contained in the "free funds" clause should be imported bodily into the "exception clause", including particularly the limitation in respect of property acquired for use upon the mortgaged lines.

In effect, they say that the function of this limitation (that is, the case where First Mortgage bonds or cash are used) in the "free funds" clause is to limit what would otherwise be a complete exclusion of all interest in the equipment, but that the function of the same limitation in the "exception clause" is to limit what otherwise would be only an exclusion of the legal title, not of the equitable title; and this argument is made in the face of the fact that in both the "free funds" clause and the "exception clause" the exclusion is worded in identical language: to-wit, "free from the lien hereof". Having thus established to their satisfaction that the limitation has no pertinent function in the "exception clause", because the words "free from the lien hereof" as used therein do not prevent the lien of their mortgage from attaching to the equitable title, they then argue that—there being no applicable limitation at all in the "exception clause"—all four of the limitations

(including the limitation in respect of property acquired for use upon the mortgaged lines) must carry over into the "exception clause".

This argument—that is, that the existence of only one limitation in the "exception clause" is immaterial—is built upon the assumption that the words "free from the lien hereof", as contained in said clause, do not mean (as in the case of the "free funds" clause) that the equipment in question is totally excluded. They propose that such words, as used in the "exception clause", be construed as if they read "free from the lien hereof to the extent (but only to the extent) necessary to vest an unencumbered security title in the equipment lienor, but otherwise to remain subject to the lien hereof". Obviously, the language of the "exception clause" does not "imperatively demand", or even suggest, that such a meaning be given. If the First Mortgage Trustees could rewrite their mortgage we have no doubt that they could devise language sustaining their claim. What we request is that the Court interpret the mortgage as it is.

The absence from the First Mortgage of such a provision as is contained in the Refunding Mortgage, expressly subjecting the equity in equipment-trust rolling stock to the mortgage lien, strongly supports the position of the Refunding Mortgage Trustee.

As is stated in our main brief (pp. 18-19), the First Mortgage, after excluding from the lien thereof equipment-trust rolling stock not acquired from First Mortgage cash or bonds, does not place back under the mortgage lien the equitable interest from time to time acquired by the Railroad Company in such rolling stock—although it is placed back under the lien of the Refunding Mortgage by the paragraph quoted in our main brief (p. 19). The First Mortgage Trustees urge (Brief, p. 29) that the inclusion of this clause in the Refunding Mortgage was due to a "meticulous" and unnecessary caution on the part of its

draftsman; and the Institutional Bondholders Committee state (p. 17) that the inclusion of such a provision in the First Mortgage would have been "surplusage" and its inclusion in the Refunding Mortgage was due to the "increasing excess of care taken by draftsmen of corporate documents". Apart from the fact that the First Mortgage is manifestly a very carefully drawn instrument, and the fact that there is nothing to indicate that later mortgages were drawn with greater care than was the First Mortgage, we do not see how the respondents—in the light of the law which existed at the date of the First Mortgage and long prior thereto—can assert that it would have been unnecessary caution on the part of the draftsman of the First Mortgage if, after excluding in plain and broad terms ("from the lien hereof") equipment-trust rolling stock, he had added a provision embodying the supposed intention to place the equity back under the mortgage lien.

In the *Chicago, Rock Island & Pacific* case, above mentioned, Judge Wilkerson was considering the meaning of an exception clause which took out from the mortgage lien after-acquired equipment not purchased by the use of the bonds issued under the mortgage. The mortgage trustee claimed that the broad language of the exclusion should be limited to equipment not acquired for use upon the mortgaged lines. The Court overruled this contention, saying (Appendix B to First Mortgage Trustees' Brief, p. 129):

> "If the parties intended that only after-acquired equipment, obtained by the railway company on its own credit for use upon lines of railway not subject to the mortgage, should be excluded from the mortgage lien, there was no reason why that intention could not have been stated in clear and unmistakable terms. The intention should not be left to be determined by conjecture or inference * * *."

There was nothing novel, when the First Mortgage was made in 1916, in the principle thus stated.

Therefore, it would have been far from an excess of caution if the draftsman of the First Mortgage had expressed the intention to subject the equity to the First Mortgage, assuming such intention. On the contrary, if such intention existed and was not expressed—particularly when the rolling stock was stated to be "free from the lien" of the mortgage,—the draftsman was highly incompetent—which is not indicated by the manner in which the mortgage was drawn.

The "Subject, However," Clause does not have the effect of placing under the First Mortgage the equipment-trust rolling stock which under the "exception clause" is to be "free from the lien" of the Mortgage.

The "Subject, However," clause—so far as material in this connection—reads as follows:[3]

> "Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, * * * ."

We pointed out in our main brief that the "subject, however," clause (referred to on page 25 of the First Mortgage Trustees' brief) does not have the effect given to it in the Commission's tentative decision of the lien question—which decision was accepted without discussion by the District Court. The Commission reasoned (R. 266) that since the "subject, however," clause must refer to property covered by the mortgage and subject to prior liens, and since such clause refers to the prior liens of equipment trusts, the implication must be that the equity in *all* rolling stock acquired under equipment trusts would be under the First Mortgage. This reasoning is unsound because if over-

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[3] First Mortgage Trustees' Brief, p. 115.

looks the fact that some of such rolling stock is certainly subject to the First Mortgage, to wit; the rolling stock in which the equity was acquired by the use of First Mortgage moneys. Such rolling stock would be subject to the equipment trusts and to the First Mortgage; but, if not financed by First Mortgage moneys, it would be "free from the lien" of the mortgage, as expressly stated in the "exception clause".

In order to support their interpretation of the "subject, however," clause as a modification—which would be in fact, a complete abrogation—of the "exception clause", and to meet our argument that the "equipment trust or conditional sale agreements * * * permitted hereby" refer to equipment financed with First Mortgage moneys, the First Mortgage Trustees argue (Brief, pp. 25-37) that First Mortgage funds could not be used to finance down payments or installments on equipment-trust rolling stock.

This argument requires them to say in effect (Brief, pp. 26-27) that the words "liens or charges" in the clause of the First Mortgage relating to draw-down of cash (Ex. 5, p. 54) do not have the definition given to those same words in that very section of the First Mortgage (Ex. 5, p. 60).

The First Mortgage requires that, for bonds or deposited cash to be taken down, there must have been delivered to the Company all documents necessary "to vest the title to such property in the Company subject only to liens or charges certified as required * * * this Section 2" (Ex. 5, p. 54—clause (a) of paragraph Sixth). By definition (Ex. 5, p. 60) the words "lien" and "charge" include "deferred payments * * * under any conditional sale agreements or lease or trust agreement covering equipment".

To avoid the evident meaning of these provisions the First Mortgage Trustees argue (Brief, pp. 25-28) that the existence of a conditional sale agreement or equipment trust makes it impossible for the Company to be vested with the "title" called for by the first quotation; but the

very case which they previously cited (*United States Mortgage & Trust Co.* v. *Chicago & A. R. Co.*, 40 F. (2d) 386; Brief, p. 16) shows that such interest as the Debtor has in equipment-trust rolling stock, whether constituting *legal* title or not, constitutes a title which may become subject to the mortgage. It is specious to argue that a clause which requires only "title * * * subject * * * to liens or charges", which latter are defined as including deferred installments under equipment trusts, can not be applied to equipment-trust rolling stock. How could the permitted "liens" and "charges" include, as specifically they do, equipment trusts, if the "title" did not include the interest acquired under the equipment trusts? The First Mortgage Trustees again resort to rewriting of the Mortgage to suit their purposes, by stating that "title" in clause (a) of paragraph Sixth must mean "legal title".

The words "lien" and "charge" are defined (Ex. 5, p. 60) as including deferred installments of purchase price of property "where title thereto has not *then* vested in the purchaser". Since clause (a) of paragraph Sixth refers to "title * * * subject only to liens or charges", it must include the equitable title or interest which is conferred by an equipment-trust agreement covering rolling stock "where title thereto has not *then* vested in the purchaser".

The First Mortgage Trustees argue (Brief, pp. 17-18) that First Mortgage bonds or cash could not be used toward the purchase of chattel-mortgaged equipment unless the lien of the chattel mortgage is subordinate to the lien of the First Mortgage; and, therefore, that it was not intended to permit the use of First Mortgage bonds or cash toward the purchase of equipment-trust rolling stock. This is one of the many involved, indirect and immaterial arguments contained in their Brief. We do not agree with their assumption regarding chattel mortgages; but we are not dealing here with chattel mortgages. We are dealing with equipment trust agreements, in respect of which the language is as plain as it could be.

There is nothing "whimsical" about the Refunding Mortgage Trustee's interpretation of the "exception clause".

The Institutional Bondholders Committee (Brief, p. 11) urges that, under the Refunding Mortgage Trustee's claim, the failure of the First Mortgage to obtain a lien on the equipment-trust rolling stock will result from the "chance circumstance" that the property was bought under equipment trusts rather than through some other form of financing. The First Mortgage Trustees assert (Brief, p. 20) that an interpretation of the Mortgage which makes its lien depend on whether equipment was purchased under an equipment trust or was purchased in some other way imputes to the draftsman "a whimsical intent which is not consistent with any intelligent purpose".

We believe that the language of the instrument should be given effect even if the respondents consider it whimsical; and we do not believe that, when clear language was used, it is necessary—or even appropriate—to speculate as to the reason. Whatever the reason for the distinction was, and whether or not the reason commends itself to the respondents as sensible, there cannot be the slightest question that the distinction was made. Where, as in the present case, the parties to a mortgage have used language plainly expressing their intention, the mortgagees cannot be heard to say some 26 years later that they do not consider that the intention expressed was sensible. As one of the judges in the Circuit Court of Appeals pointed out during the oral argument, it would have been perfectly competent for the Mortgage to provide that all locomotives bought from Baldwin Locomotive Works should be free from the lien thereof; and the enforcement of such a provision would not depend on the parties' ability many years later to explain the reason why such a provision had been agreed on.

The listing applications should not be disregarded.

The meaning of the "exception clause" is sufficiently clear without the Court's being required to rely on the statements in the First Mortgage Bond Listing Applications which refer to this very equipment-trust rolling stock as "additional *unmortgaged* equipment * * *" (R. 1074); but we maintain that such listing applications, submitted, at the time of issue of First Mortgage Bonds, to the stock exchange which furnished the principal market for such bonds, are entitled to substantial weight.

The same statement, that equipment-trust rolling stock was unmortgaged, was contained in every listing application for First Mortgage bonds from July 16, 1925 (R. 1325-1335) to December 21, 1931 (R. 1074). Regardless of whether the First Mortgage bondholders made the statement, it constituted, in the language of this Court "a representation to future purchasers" as to the limitations of their lien (*Continental Co.* v. *U. S.*, 259 U. S. 156, 181). The relevance of the listing applications does not depend exclusively on their character as an admission against interest, as the First Mortgage Trustees seem to argue. They constitute a source of information for investors inquiring concerning the lien of the bonds, and are entitled to the same weight which would be given to a prospectus. The assertion by the Institutional Bondholders Committee that the listing statements are self-serving declarations by holders of Refunding Mortgage bonds (Brief, pp. 18-19) is wholly unjustified. As a matter of fact, the last listing application was issued some months before the Refunding Mortgage was executed.

The only First Mortgage bonds ($27,000,000 in principal amount) which had been issued before the 1925 listing application was filed were the original issue ($20,000,000) in 1916, an issue in 1921 used to purchase the Sacramento Northern Railroad properties, and an issue in 1922 to retire outstanding equipment trust certificates (R. 1046). Obvi-

ously none of the holders of these issues had relied on the equipment-trust rolling stock here in dispute, which was acquired under the agreements of 1923, 1924 and 1929, and the Baldwin lease of 1931. It follows that there is no injustice to them—as is claimed by the First Mortgage Trustees (Brief, p. 35)—in considering the listing applications as evidence of the meaning of the "exception clause."

There is no evidence that any prospectus inconsistent with the listing statements was ever distributed to purchasers of First Mortgage bonds. On the contrary, the only preliminary information concerning First Mortgage bonds which the record contains (I. C. C. Ex. 93) clearly indicates that substantial equipment was free from the First Mortgage lien. The "Specifications of Securities Offered for Sale", in connection with the issue of $1,000,000 of First Mortgage bonds in January, 1931 (before the Refunding Mortgage was created), stated (third page of Exhibit 93):

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other railroad properties in the cities of San Francisco, Oakland and elsewhere, and *certain* of its rolling stock and equipment * * *."

Equipment which is "free from the lien" of the First Mortgage is not made subject to its lien by any covenant in the First Mortgage.

In Part V of Point II of the First Mortgage Trustees' brief (pp. 37-50), they try to bring the equipment-trust rolling stock within their mortgage lien by arguing that the rolling stock is made subject to the First Mortgage by the provision of the granting clauses which covers, among other things, "additions", and by the covenant in Article Fourth of the Mortgage to keep the railroad supplied with "replacements and * * * additions":

In the face of the specific provision in the final paragraph (the "exception clause") of the granting clauses that equipment-trust rolling stock shall be "free from the lien hereof", the general reference to "additions" in an earlier part of the granting clauses is limited, as are the other general granting clause provisions, by the "exception clause"—so that the granting clauses need not be further considered.

The position of the First Mortgage Trustees with respect to the mortgage covenants represents a new shift of ground, abandoning the contentions on which they previously relied. Their present brief, filed $5\frac{1}{2}$ years after the conclusion of the Commission hearings, is the first time that the present argument has appeared in the case. In the Commission, both before the Examiner and on objections to the Examiner's report, the First Mortgage Trustees omitted any suggestion that they relied on any part of the First Mortgage except the granting clauses. In the District Court and the Circuit Court of Appeals they introduced a claim that the maintenance covenant and the replacement covenant, referred to in our main brief in this Court (pp. 32-40), gave them a lien on so much in value of the equipment-trust rolling stock as was necessary to equal the bookkeeping entries made for depreciation on First Mortgage equipment up to the date when the Refunding Mortgage lien attached. They now virtually abandon the claim formerly made under the *second* part of the maintenance covenant and under the replacement covenant, and say that our answers to that claim (which, we believe, conclusively disposed of it) "have no bearing" (Brief, p. 45) because the real question is the effect of the word "additions" in the *first* part of the maintenance covenant.

The covenant on which they now rely significantly omits the language of the replacement covenant which states that the First Mortgage "shall constitute a first lien" on replacements of equipment which is "worn out or destroyed". The reason for this omission is apparent. They are seek-

ing not only the replacement of equipment "worn out or destroyed", but also an amount in new equipment equivalent to the book depreciation on the equipment actually in use. The entire maintenance covenant is as follows:[1]

> "Section 9.—The Company will diligently preserve all of the rights and franchises to it granted and upon it conferred and will at all times maintain, preserve and keep its railroad system and property in good repair, working order and condition and will from time to time make all needful and proper repairs, renewals and replacements and alterations, additions, betterments and improvements; and will cause each subsidiary company to preserve its rights, franchises and property in like manner and to like extent.
>
> All equipment upon which this indenture is or shall be a first lien shall be marked so as to identify the same as equipment subject to this indenture as a first lien thereon, and the Company will at all times keep such equipment in good order and condition, *reasonable wear and tear excepted*, and marked distinctively as aforesaid, and will replace such of said equipment as shall be worn out or destroyed with other equipment of at least equal value on which this indenture shall constitute a first lien.
>
> The Company will, at such times as the Trustees may request, furnish to them a complete list of all equipment upon which this indenture is or shall be a first lien; but the fact that any such equipment shall not be marked or included in such list shall not create any presumption that the same is not subject to this indenture as a first lien thereon."

When the covenant is read as a whole it is clear that the language in the first part of the covenant with regard to "additions", on which the First Mortgage Trustees rely, relates to the railroad property generally and does not apply to equipment, concerning which there is a specific provision in the succeeding paragraph of the covenant. An

[1] I. C. C. Ex. No. 5, p. 76.

argument that the use of the words "alterations, additions, betterments and improvements" means that the Railroad Company must subject to the mortgage equipment equivalent in value to the accrued depreciation is very far-fetched indeed.

One section of the First Mortgage Trustees' brief (pp. 40-43) is given over to a discussion of the *Minneapolis & St. Louis* case (36 F. (2d) 747—C. C. A. 8) and the unreported *Rock Island* decision of Judge Wilkerson (First Mortgage Trustees' brief, pp. 116-144).

These cases relate to maintenance and replacement covenants but not to the claim respecting "additions". Neither of those cases contains any discussion of the question whether maintenance or replacement covenants are brought into play by mere depreciation—particularly where, as in the present case, replacement for reasonable "wear and tear" is specifically not required. So far as appears from the language in the *Minneapolis & St. Louis* case, which interprets a replacement covenant to require that "the same value amount" of equipment be kept under the lien of the Mortgage, the holding should receive the same interpretation which we assert herein—namely, that equipment which is worn out, destroyed or disposed of be replaced with equipment of corresponding value and amount. The covenant which was being interpreted in the *Minneapolis & St. Louis* case related to the disposal and replacement of equipment which had "become unfit for such use" (36 F. (2d) at 756). There is no suggestion that the covenant required equipment to be supplemented by the amount of depreciation charged on the books of the railroad against equipment in use.

The opinion in *Chase National Bank* v. *Mobile & Ohio R. R. Co.*, (unreported—cited at page 35 of our main brief) interprets the *Minneapolis & St. Louis* case as meaning only that equipment which has become unfit for use must be replaced with new equipment of equal value. In that

case there were maintenance and replacement covenants[1] in a divisional mortgage, very similar to the covenants contained in the First Mortgage in this case.

After citing the *Minneapolis & St. Louis* case with approval, the Special Master (whose report was confirmed by the Court) stated (Report, pp. 139, 138):

> "* * * From my construction of the Montgomery Division Mortgage, the security demanded, insofar as it concerned rolling stock, was sufficient rolling stock to amount in value to the rolling stock originally purchased, subject to wear and tear. The reason I say subject to wear and tear is that *it was the intention of the parties that replacements should not be made until items of rolling stock became unfit for use*, and the evidence shows that this happened at various times over a long period."

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[1] The covenants in the *Mobile & Ohio* case read as follows (Special Master's report, p. 132):

> "The mortgagor shall and will, until all the Montgomery Division Bonds are fully paid and satisfied, well and thoroughly keep up and maintain as fast as the same shall be constructed and opened for operation, the mortgaged line of railway as a first-class railway, and will keep the same in all respects well and sufficiently equipped, and make all necessary repairs and replacements, so to keep up in good order the mortgaged railway property, rolling-stock and equipment."

> "The mortgagor, its successors and assigns, may from time to time, dispose, according to its or their discretion, of such portion of the equipment, machinery and implements at any time held or acquired for the use of the said line of railway, as may have become unfit for such use, replacing the same by new, which shall at once be subject to the lien of this indenture without any further conveyance or mortgage; and if the Trustee so desire, the same shall be conveyed and transferred to it for the purposes and upon the trusts herein declared, in such manner as it shall be advised by counsel."

"I believe that the parties to the Montgomery Division Mortgage intended to provide, and did provide for a lien upon all equipment originally purchased and the replacements that later were purchased, and I have so found. The latter lien would be on the rolling stock of Mobile and Ohio in valued amount sufficient to replace the original equipment *in its depreciated condition. Guaranty Trust Company* v. *Minneapolis & St. L. Ry. Co.*, supra."

The complicated formula of Judge Wilkerson in the *Rock Island* case, from which the First Mortgage Trustees attempt to spell out a requirement that *additional* equipment be placed under their mortgage to compensate for depreciation, cannot be relied upon for that purpose. In the first place, there is nothing in the opinion to indicate that the extent of replacement claims (as distinguished from the question of lien, with which the opinion was primarily concerned) was contested or, if so, the grounds upon which it was contested. In the second place, the Court refers in three successive clauses to credit for equipment necessary "to *replace*" mortgaged equipment; and, we repeat, "replace" does not mean "add equipment equal in value to book charges for depreciation on equipment in use."

Moreover, as we showed in our main brief (pp. 36-40), maintenance and replacement covenants are not self-executing, and do not create a lien on equipment not otherwise placed under a mortgage. If Judge Wilkerson's decision were construed as creating a lien on otherwise free equipment as a replacement of mortgaged equipment[1], it would be contrary to the rule of the Seventh Circuit (controlling on Judge Wilkerson) as established in *Metropolitan Trust Co.* v. *Chicago and E. I. R. Co.*, 253 Fed. 868, 879 (our main brief, p. 39), and to the other cases set forth in our main brief.

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[1]The only First Mortgage equipment which there can be any obligation to "replace" is the net retirements, aggregating not more than $641,886 in original book value (First Mortgage Trustees' brief, p. 14).

In effect, the First Mortgage Trustees are attempting to import another limitation into the "exception clause" so that, for equipment to be "free from the lien" of the First Mortgage, it must not only not have been acquired with First Mortgage funds, but also there must be no existing depreciation of mortgaged equipment.

II

The Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage money used in the acquisition thereof.

(Answering Point III of First Mortgage Trustees' brief and Point III of Institutional Bondholders Committee's brief.)

The Northern California Extension, built at a cost of over $10,000,000, was financed only to the extent of less than half of its cost by First Mortgage money. No Supplemental indenture placing the extension under the First Mortgage lien was ever executed. It was not even a part of the line which the Debtor was authorized to operate at the time the First Mortgage was created (although later authorized); and it was not built until some 15 years after the date of such mortgage.

The brief of the First Mortgage Trustees indicates (pp. 67-68, 78-81) a misunderstanding of our argument in respect of the absence of a supplemental indenture. We do not assert that, if the Extension can be said to be covered to any extent by the after-acquired property clauses contained in the First Mortgage, a supplemental mortgage was necessary in order to perfect such coverage. The question is whether the Extension was covered by the First Mortgage to the extent of the entire issue of $50,000,000, or only to the extent of the First Mortgage money expended thereon. What we do assert is that it would be inconceivable for a supplemental mortgage to be omitted when so important an item of uncontemplated property was acquired so many

years after the date of the original mortgage; if it was intended that the Extension should come under the full $50,000,000 lien of the original mortgage—rather than under the mortgage lien to the extent of the First Mortgage money expended thereon—in spite of the fact that more than one-half of its cost was financed outside of the mortgage.

We suggest that the omission of such a supplemental indenture may well be explained by the fact that ever since the second offer by the A. C. James Company in June, 1929 (I. C. C. Ex. 40) to finance a part of the cost of the Extension, it had been known that the Extension would be built in part by First Mortgage moneys and in part by other moneys, and the relative rights were controversial. However that may be, if it had been the intention to subject the Extension to the entire $50,000,000 First Mortgage lien, it seems certain that a supplemental indenture would have been executed so providing.

Otherwise the First Mortgage bondholders would have to rely on the counsel's opinions (next mentioned) which accompanied the requests for the drawdown of cash, all of which simply stated that (see I. C. C. Exhibit 62):

> "In my opinion title to those portions of this Company's new line of railroad known as its 'Northern California Extension' * * * as to which reimbursement for deposited cash is sought by this requisition for expenditures in the matter of construction and/or acquisition, has vested in the Western Pacific Railroad Company, subject only to liens or charges certified in said certificate and to liens or charges of the character not required to be certified * * * and all said portions of said extension and said property are subject to the lien of this Company's First Mortgage, and no supplemental indenture or instruments of further assurance are necessary to subject said property, or any part thereof, to the lien of said First Mortgage, subject only to the liens and charges aforesaid."

It is no answer to suggest, as does the brief of the Institutional Bondholders Committee (pp. 26-27), that the sup-

plemental indenture was omitted because of counsel's said opinions. We do not dispute that the First Mortgage attached to the Extension; but there is nothing in the counsel's opinions (I. C. C. Exs. 61-73)—or in anything else which we have seen—which states that the First Mortgage would become a lien beyond the amount of the First Mortgage moneys expended on the property.

The Extension has been a major factor in producing revenue for the Debtor, and has shown itself to be worth at least the amount of its cost. The Refunding Mortgage Trustee asks that the creditors secured by Refunding Mortgage bonds, who supplied more than half of the money required for the construction of the Extension, and whose money enabled the Extension to be completed, be recognized as having a lien on the Extension coordinate with the lien of the First Mortgage for First Mortgage funds expended thereon, or even a second lien but subject only to the $5,000,000 which the First Mortgage creditors contributed to its construction.

In our appellant's brief before the Circuit Court of Appeals we pointed out that the argument made by the First Mortgage Trustees, if correct, would lead to the conclusion that the whole of the $10,000,000 Extension would be subject to the $50,000,000 mortgage if, for example, only $5,000 of First Mortgage moneys had been expended thereon, and that such an argument completely disregards the equities in a case wherein the First Mortgage Trustees—in asking the enforcement of after-acquired property clauses—are seeking equitable relief. In answering, the brief of the First Mortgage Trustees asserted that the Extension would be thus subject even if only "one penny" of First Mortgage money had been expended thereon. Nothing could bring out more clearly the extreme results to which their argument leads. There is no stopping point between a substantial expenditure and an expenditure of "one penny".

We do not argue for any such breaking up of the extension into scattered pieces as the First Mortgage Trustees state (Brief, pp. 75-78) under what they term our "separate segment theory". The First Mortgage Trustees, who admittedly had the burden of showing on what property their mortgage was a lien, did not undertake to show what portions of the "land for transportation purposes" were acquired with their money. It is unjustified, we believe, for the First Mortgage Trustees to assume, as they do in their brief (p. 51), that the Extension had come into existence "as a continuous right of way" before any of the Debentures (which were later converted into debt secured by the Refunding Mortgage) had been issued; or to assume, as their brief does (p. 76), that "it is a fair inference that" by December 31, 1930 "the right of way for the entire line had by then been acquired." Our argument is that, especially where it appears that the acquisition of the entire right of way was not financed under the First Mortgage, a court of equity should treat the Extension as subject to the First Mortgage only in proportion to the amount which was financed with First Mortgage money, and that this gives the First Mortgage all that it is entitled to.

Incidentally, the Institutional Bondholders' Committee is incorrect in asserting (Brief, p. 21) that the Extension was completed and put into operation on November 10, 1931. Although the tracks were laid so that trains could be run over the Extension at that time, it was still under the jurisdiction of the construction department, and was not placed in commercial operation until June 1, 1942 (Stipulation of Facts not in Dispute, R. 1077)—a fact which is recognized in the brief of the First Mortgage Trustees (p. 50).

The brief of the First Mortgage Trustees quotes (at pp. 70-71) granting clause Third, paragraph (a) of the First Mortgage. The First Mortgage Trustees' brief argues (p. 70) that this clause

> "is stated in the alternative: an after-acquired extension falls within the scope of the after-acquired

property clause, if either (1) the extension be 'acquired or constructed' by the use of First Mortgage Bonds or deposited cash; or (2) First Mortgage Bonds or deposited cash be taken down 'on account of the purchase, acquisition or construction thereof or work thereon.'

The difference between the two alternatives is apparent from the words used. The first alternative must contemplate a financing entirely by the use of First-mortgage Bonds or deposited cash; the second alternative, with the words 'on account of', and the words 'or work thereon', must contemplate a financing in part by such means. In either case, the extension falls within the scope of the after-acquired property clause, and there is no language which suggests an intent that the lien of the First Mortgage should attach to an extension financed in part by the use of First Mortgage Bonds or deposited cash to a lesser extent than would be the case if the extension were financed entirely by such means."

The question immediately arises as to why there were alternative provisions. If it was intended that the extension should be subject to the entire First Mortgage lien independent of the amount of First Mortgage moneys expended, there would have been no reason for the alternative. If the extension would have been thus subject to the entire First Mortgage lien in the event that First Mortgage bonds or deposited cash be taken down "on account of the purchase, acquisition or construction thereof or work thereon", this would have taken care of the entire situation. It certainly would not have been necessary to provide also that the Extension would be subject to such lien if totally financed by First Mortgage bonds or deposited cash.

We agree with their argument to the extent that we make no assertion that extensions financed in part by First Mortgage bonds or deposited cash are wholly free from the First Mortgage. Our argument is that such an extension is entirely subject to the First Mortgage if wholly financed by

First Mortgage bonds or deposited cash; that if financed only in part by such bonds or cash it is subject to the First Mortgage lien to the extent so financed; and that the mortgage itself shows the intention to differentiate between the case where the financing is done entirely by the use of such bonds or cash and the case where it is only partially so done. We suggest that the reason for the differentiation may well have been to recognize that the money extent of the mortgage lien would depend upon the amount of First Mortgage moneys used in the financing.

In this connection, we again refer to the authorities cited in our main brief (pp. 20-21) holding that, in order to extend the coverage of a mortgage by its after-acquired property clauses, the terms employed must "imperatively demand" the construction contended for. This test has not been met.

Both the First Mortgage Trustees and the Institutional Bondholders' Committee make much of Mr. A. C. James' connection with the financing of the Extension, the Committee stating (Brief, p. 27) that the James interests are "in equity estopped" to make any claim that the Extension is not subject to the entire First Mortgage issue. No such claim is made against the other Refunding Mortgage creditors. This statement is not justified, even against the James interests. The most that can be said is that Mr. James knew that $5,000,000 of First Mortgage money was going into the Extension, and that such money was entitled to a lien which could not be displaced; but there is nowhere any proof that he understood that the Extension would be subject to the Mortgage lien beyond the amount of the First Mortgage moneys expended. It is significant that, as the figures set forth in the First Mortgage Trustees' brief (pp. 46-47) show, the total amount of expenditure certified to the First Mortgage Trustees was only $5,000,000. There was thus no representation to the First Mortgage Trustees that they were obtaining a lien in excess of the First Mortgage funds expended. And, as we have pointed out in our main

brief (pp. 37-38), the "specifications of the securities offered for sale" when the First Mortgage Bonds were issued carefully avoided stating that the First Mortgage debt would be a first lien on the Extension. It is true that the specifications under which the Debentures were purchased by A. C. James Company referred to the Extension as to be a part of the "main" line, and that the Specifications contained the statement set out in the First Mortgage Trustees' brief (p. 60) and in the Institutional Bondholders Committee brief (p. 23) as follows:

> "The First Mortgage of this Company dated June 26, 1916, securing this Company's First Mortgage Bonds, whereunder not more than $50,000,000. thereof may be outstanding at any one time, is a first lien on said main line of railroad."

We believe that the words "whereunder not more than $50,000,000. thereof may be outstanding at any one time" are merely descriptive of the First Mortgage, and fail far short of establishing that the entire $50,000,000 lien would fasten to the Extension independent of the amount of First Mortgage moneys expended thereon. The "main line" referred to in said Specifications was stated as aggregating 1056.5 miles (prior to the construction of the Extension of 112 miles (R. 1076)), so that as to most of the railroad it was correct to refer to the $50,000,000 lien. However, there was no necessity, in generally-worded specifications of this nature, to define the money extent of the First Mortgage lien on the Extension, provided always that the First Mortgage lien, to such extent as it should attach, should not be displaced.

As illustrative of the loose manner in which the lien of the First Mortgage on the Extension was described, it should be noted that in its application to Reconstruction Finance Corporation, dated February 5, 1932, for the loan which included the first R. F. C. advance of $259,000 on account of the Northern California Extension (I. C. C. Ex. 82), the Debtor stated (I. C. C. Ex. 82, sheet 6 in Schedule

P) that $259,000 was required to pay contractors for work in constructing the "branch line", that is, the Northern California Extension (see First Mortgage Trustees' brief, p. 65), and furthermore, the property of the Debtor was described as consisting of 925.706 miles of main line with various branches, including the Northern California Extension, "making a total of main line and branch line mileage of approximately 1163 miles". Thus, in spite of the earlier description of the Northern California Extension as a part of the "main line", it was later classified not as "main line" but as "branch line". This gives point, we believe, to our statement that the extract just quoted from the specifications was a general description and was not intended to settle such controversy as might later arise as to the extent of the First Mortgage lien.

Whatever may have been the situation prior to the time and at the time (February 27, 1931—First Mortgage Trustees' brief, p. 62) when the first of the Debentures were issued, it should be noted that the situation changed materially by the time when the Refunding Mortgage was executed (February 29, 1932—R. 1022).

While it is true that the $5,000,000 originally advanced for the completion of the Extension was advanced in return for the Debentures (Stip., par. 99, R. 1078), it is not entirely accurate to say that they were "unsecured". In the original proposal of the A. C. James Company (I. C. C. Ex. 45), which was not acted upon, it was stated that its advance of $5,000,000 was to be secured by a "first lien" upon the Extension, and that the new trust indenture should expressly provide:

> "* * * you will not place any additional mortgage indebtedness upon any other real property owned by you, over and above the bonds authorized under your present existing first mortgage of June 26, 1916, without providing, from the proceeds of such additional financing, for the redemption of these bonds."

The subsequent proposal (I. C. C. Ex. 46), which was acted upon, omitted the demand for a "first lien"; but it continued the requirement for the redemption of the Debentures in case that any further lien (other than authorized first mortgage bonds) should be placed upon the Railroad Company's real property. The last mentioned provision was embodied in the indenture under which the Debentures were issued (I. C. C. Ex. 50, p. 32). Not only was this provision embodied in the indenture, but it came into full force and effect because the First Mortgage bonds and the Debentures were not sufficient to finance the Extension, and it was necessary to borrow an additional amount of over $500,000 from the Reconstruction Finance Corporation and to secure said loan by a lien (i. e. the Refunding Mortgage) on the property (Stip., pars. 99, 112-123, R. 1078, 1084-1089). Therefore, the Debentures were in effect redeemed (Refunding Mortgage, I. C. C. Ex. 6, pp. 2-3); but the holder thereof, instead of receiving cash, accepted a new note secured by Refunding Mortgage bonds (Stip. pars. 116, 117, R. 1085-1086).

The retirement of the Debentures and the simultaneous issuance of a new note secured by the Refunding Mortgage bonds created a new transaction—just as if the holder of the Debentures had received cash in redemption and then had reloaned the cash upon the security of the Refunding Mortgage. Thus, not only the other creditors but also the A. C. James Company, as the holder of the originally-issued Debentures, have come into their existing position in proper reliance upon the lien of the Refunding Mortgage; and there is no estoppel against A. C. James Company except to prevent it from asserting—what never has been asserted—that the first lien of the First Mortgage, to the extent of the First Mortgage moneys expended thereon, has been displaced.

The First Mortgage Trustees rely (Brief, p. 57) on statements, in the resolutions accompanying the requests for draw-down of First Mortgage cash, that "all portions

of said extension which have been constructed and/or acquired being subject to the lien of said First Mortgage and now in the possession of this Company" (I. C. C. Ex. 62, sheet 10). However, the opinions of Debtor's counsel which accompanied said resolutions carefully described as subject to the First Mortgage not all portions constructed or acquired, but only "those portions as to which reimbursement from deposited cash is sought by this requisition" (I. C. C. Ex. 62, sheets 8-9). The language of the resolutions must be interpreted in the light of the opinions of counsel which accompanied them, and should not be given any broader effect.

The First Mortgage Trustees also rely (Brief, p. 57) on statements in the officers' certificates that "so far as known or believed by us the property so constructed or acquired as aforesaid, is not subject to any lien or charge, except (a) necessarily undetermined liens or charges ordinarily incident to construction and (b) the lien of said First Mortgage" (I. C. C. Ex. 62, sheet 11). These certificates can have no relation to the lien of the Refunding Mortgage since they were all executed *before the date of execution of the Refunding Mortgage* (Stip. Par. 109, R. 1081). They contain no assurance that the First Mortgage was a lien for \$50,000,000. upon an Extension to which it contributed \$5,000,000.

The First Mortgage Trustees also rely (Brief, p. 66) on the following statement contained in the application to the Reconstruction Finance Corporation for a loan on May 23, 1932 (I. C. C. Ex. 87, p. 15):

> "The General and Refunding Mortgage is a first lien on certain securities having a book value of \$2,374,655, and a second lien on all of the remaining property of the Railroad Company, subject only to \$49,290,100 First Mortgage Bonds now outstanding and \$4,550,000 of Equipment Trust Certificates."

Upon its face this is merely a loose and general statement. It is true as to most of this large railroad property;

but it is slim ground upon which to rely for a contention that the Refunding Mortgage was thus excluded from a *pari passu* lien on the Extension. The careful specification in the Refunding Mortgage that it was subject to the First Mortgage "only in so far (in extent * * * or otherwise)" as the same attached to any of the Debtor's property, may not be nullified by such a statement.

III

The First Mortgage is not a lien on non-carrier real estate.

(Answering Point IV of the First Mortgage Trustees' Brief, and Point IV of the Institutional Bondholders Committee's brief).

The Institutional Bondholders Committee set up a straw man in the first part of their Point IV, in arguing concerning the effect of the 1934 subordination agreement on the cash and receivables which the Debtor had on hand when the reorganization proceedings began. No claim to those items has been made by the Refunding Mortgage Trustee in this Court or in the court below.

In respect of the non-carrier real estate, the Institutional Bondholders Committee asserts (Brief, p. 33) that First Mortgage money has been spent on the Islais Creek property. This statement is extremely misleading, for the property which was acquired with the First Mortgage moneys referred to by the Committee is not the same property which the Refunding Mortgage Trustee claims. No First Mortgage money was used on the portions of the Islais Creek property which were owned at the date of the First Mortgage. Although substantial amounts were spent for improvement or benefit assessments on such property, the Debtor carefully refrained from making any of them the

subject of requisitions against First Mortgage bonds or cash, and all of them remained on the list of uncapitalized expnditures (I. C. C. Ex. 31—lines 1565, 1694, 1715, 1752 etc—R. 2094) at the time of the reorganization.

The Islais Creek property which the Debtor owned in 1916, and which is the principal real estate item in dispute, was never carrier property. Its description as "non-carrier" property was not a mere change in accounting classification by the Interstate Commerce Commission, as the First Mortgage Trustees suggest (Brief, p. 99), but a recognition of what had always been true. It was based upon a finding by the Commission (Ex. 104, p. 276) that the lands were not used for carrier purposes on June 30, 1914 (prior to the date of the First Mortgage), and that there was then no prospect of their use for such purposes.

Although the First Mortgage Trustees argue (Brief, pp. 99-103) that the First Mortgage provisions are broader than the description of the First Mortgage lien in the 1915 reorganization plan and that the plan language does not control, it is significant that the only prospectus for First Mortgage bonds which is in the record (Ex. 93, p. 3) repeats substantially the language of the 1915 plan with respect to the extent of coverage, stating:

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other *railroad* properties in the cities of San Francisco, Oakland and elsewhere, and certain of its rolling stock and equipment. * * *"

The claim to a lien on the non-carrier real estate is not altogether consistent with what the First Mortgage Trustees argue (in their Point I) was the "underlying purpose" of the First Mortgage, to give a lien on the "*railroad* enterprise as an *operating* entity". In the absence of a clearer reason for including it than is stated in the respondents' briefs, it should be treated as unmortgaged property.

IV

Answering the "practical interpretation" claimed by the Institutional Bondholders Committee.

The Institutional Bondholders Committee argue (Brief, pp. 37-38) that the Refunding Mortgage Trustee's claims of priority are entitled to little weight because of the concession of the First Mortgage priority in various plans which were proposed during the course of the proceedings. Their brief neglects to state that the plans proposed by A. C. James Company, Reconstruction Finance Corporation, and the Debtor (which proposals, of course, represent compromises rather than statements of legal position) each provide for a substantial *quid pro quo* in return for the concession of priority. Each of the plans referred to provided for a capitalization adequate to satisfy the claims of the Refunding Mortgage creditors in full and leave something over for the Debtor's general creditors and stockholders (of which A. C. James Company is one).

The willingness of parties to concede one position in order to gain another one in no way deprives them of their right to insist on the original position if the compromise fails, and should not be referred to as an admission any more than any unconsummated settlement negotiations.

In asserting "practical interpretation" as against the Refunding Mortgage creditors, the brief of the Institutional Bondholders Committee states (p. 38):

> "No specific provision for the relative participation of the First Mortgage Bondholders and the collateral noteholders was made in any proposed plan which did not recognize such priority, until the filing before the District Court of the ACJ objections on December 8, 1939, containing the suggestion by ACJ of a wholly new plan never theretofore discussed."

This statement may well carry the inference that the A. C. James interests and the other Refunding Mortgage creditors did not dispute the priority of the First Mortgage until they came before the District Court. Such an inference would be entirely contrary to the fact. The priority of the First Mortgage in respect of the properties now in question was disputed during the taking of testimony before the Commission and in the briefs filed with the Commission.

Conclusion

The decrees of the Circuit Court of Appeals should be modified in accordance with the prayer of petitioner's main brief, and the proceeding referred back to the Interstate Commerce Commission for appropriate modification of the reorganization plan.

New York, October 10, 1942.

Respectfully submitted,

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ORRIN G. JUDD,
Of Counsel.